APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25,416

PUREX CORPORATION, LTD., a corporation,
Plaintiff-Appellee,

vs.

THE PROCTER & GAMBLE COMPANY, a corporation
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California

Decided and Filed December 3, 1971

Before: CHAMBERS and DUNIWAY, Circuit Judges, and SOLOMON, District Judge:*

DUNIWAY, Circuit Judge:

In August, 1957, The Procter & Gamble Company acquired the Clorox Chemical Company. On September 30, 1957, the Federal Trade Commission instituted a proceeding against Procter charging that the acquisition tended to lessen competition and therefore violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Commission held that the acquisition violated Section 7. 63 F.T.C. 1465 (1963). On review, the Court of Appeals for the Sixth Circuit set aside the Commission's order as not supported by substantial evidence. *Procter & Gamble Co.* v. *F.T.C.*, 6 Cir., 1966, 358 F.2d 74. The Supreme Court reinstated the Commission's order. *F.T.C.* v. *Procter & Gamble Co.*, 1967, 386 U.S. 568.

This appeal arises in a private antitrust action brought by Purex Corporation, Ltd. against Procter. Purex claims

* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

that the acquisition of Clorox by Procter and the conduct of the Clorox business during the period of Procter's ownership violated Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act, and that as a result of these unlawful acts it has suffered large damages. Purex further claims that Section 5 (a)[1] of the Clayton Act, 15 U.S.C. § 16 (a) entitles it to use the Commission's order and the judgment of the Supreme Court as *prima facie* evidence in this action. In the court below Procter sought a ruling that the Commission order and the judgment could not be so used because neither is a "final judgment or decree" within the meaning of Section 5(a). The court denied Procter's motion, and Procter appeals under 28 U.S.C. § 1292(b). We affirm.

In *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 1 Cir., 1969, 421 F.2d 61, the First Circuit held that a final order of the Federal Trade Commission based upon a charge of violating Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act (5 U.S.C. § 13(a)) was admissible under Section 5(a) in a treble damage action charging the same violations. We are in general agreement with the reasoning in *Farmington*, but we need not go so far as the court went in that case.

In *Farmington*, the order in question was the F.T.C. order reviewed in *Forster Mfg. Co.* v. *F.T.C.*, 1 Cir., 1966,

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[1] "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title." 15 U.S.C. § 16(a).

361 F.2d 341. This was an order to which the Finality Act of 1959, Pub.L. 86-107, 73 Stat. 243, now 15 U.S.C. § 21, was held applicable in *Farmington, supra*, 421 F.2d at 70-71 n. 25. In the *Forster* case, Forster Mfg. Co. sought review of an F.T.C. order under 15 U.S.C. § 21(c). That section provides:

> "To the extent that the order of the Commission . . . is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the Commission. . . ."

However, the court did not do this; the opinion concludes (361 F.2d at 343): "The petition will be dismissed." The Supreme Court denied certiorari on January 9, 1967, 385 U.S. 1003. Thus the F.T.C. order, rather than being embodied in a decree, became final as an order of the F.T.C., issued under 15 U.S.C. § 21(b), by reason of the following provision of 15 U.S.C. § 21(g):

> "(g) Any order issued under subsection (b) of this section shall become final—
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> . . . .
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> (3) upon denial of a petition for certiorari if . . . . the petition for review has beeen dismissed by the Court of Appeals. . . ."

It is that final order of the *Commission* that was received in evidence in the *Farmington* case. It is true that in footnote 3 to the opinion in *Farmington* (421 F.2d at 65-66) it is stated that in *Forster* "the order . . . was affirmed by us." It does not appear, however, that the court ever issued an order under § 21(c) commanding obedience to the F.T.C. order, or that any such order of the court was offered in evidence in *Farmington*.

Here, the situation is different. The Commission's proceeding against Procter was begun in 1957, but its order was not entered until November 26, 1963. Thus, if the view

of the court in *Farmington* is correct, the Finality Act also applies to that order. The trial judge did not agree; he was of the opinion that the Finality Act does not apply because the F.T.C. proceeding was initiated before the effective date of that Act, citing *F.T.C. v. Jantzen, Inc.*, 1967, 386 U.S. 228. We need not decide whether the *Farmington* court or the trial judge is right.

Under the Finality Act, 15 U.S.C. § 21 as amended by that Act, and assuming that it is applicable to the F.T.C. proceeding, Procter could and did seek review of the F.T.C. order. The culmination of the review proceedings was the decision of the Supreme Court in *F.T.C. v. Procter & Gamble Co.*, 1967, 386 U.S. 568. There, the Court remanded to the Court of Appeals ". . . with instructions *to affirm and enforce* the Commission's order." (386 U.S. at 581, *emphasis added.*) Presumably, the Court of Appeals has complied with these instructions and has issued a final "judgment and decree" "enforcing the . . . [order] to the extent that such order is affirmed." (§ 21(c)). Obviously, that judgment and decree is long since final under § 21(g)(4).

On the other hand, if § 11 of the Clayton Act (38 Stat. 734) as it read before the effective date of the Finality Act, is the statute applicable to the F.T.C. order against Procter, the result is the same. Under the fourth paragraph of that section, Procter could and did seek review in the Court of Appeals. And the fourth paragraph of the section empowered the court, in such a proceeding, "to affirm . . . as in the case of an application by the Commission . . . for . . . enforcement. . . ." The third paragraph, dealing with an application by the Commission "for the enforcement of its order," gives the court power "to make and enter . . . a decree affirming . . . the order of the commission. . . ." The sixth paragraph refers to "the judgment of the court to enforce." Just such a judgment has been entered and is now final.

As the Supreme Court said in *United States* v. *Morton Salt Co.*, 1950, 338 U.S. 632, 641 "... the [Federal Trade] Commission's cease and desist order was merged in the court's decree. . . ." Or, as stated by the Second Circuit in *NLRB* v. *Filtron Co.*, 1962, 309 F.2d 184, a decree of the Court of Appeals enforcing an order of an administrative body (in that case the National Labor Relations Board) ". . . is, of course, the court's order, and not that of the Board." (Quoting from *NLRB* v. *Local 111, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 1 Cir., 1960, 278 F.2d 823). Of course the Clayton Act Section 5 was as much a part of that Act as was the original section 11. Section 5 makes admissible "A final judgment or decree . . . rendered in any civil . . . proceeding brought . . . on behalf of the United States under the anti-trust laws . . . ." We have precisely such a decree here. Surely a proceeding under § 11 is a "civil proceeding."[2] Surely a proceeding by the F.T.C. is brought "on behalf of the United States." *N. J. Wood Finishing Co., supra*, n. 2, at 353. And there can be no dispute that the decree is "final." All of the foregoing is equally applicable both to the judgment of the Supreme Court in *F.T.C.* v. *Procter & Gamble Co., supra*; and to the decree of the Court of Appeals for the Sixth Circuit, entered in response to the Supreme Court's instructions.

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[2] As originally enacted, § 5 referred to any "suit or proceeding in equity" rather than to "any civil . . . proceeding" as it now reads. As is pointed out in *N.J. Wood Finishing Co.* v. *Minnesota Mining & Mfg. Co.*, 3 Cir., 1964, 332 F.2d 346, 355 (*aff'd. on other grounds*, 1965, 381 U.S. 311), a court of appeals, in reviewing an order of the F.T.C. sits "not as an appellate court but as a court of equity enforcing . . . the order of the F.T.C.".

With the merger of law and equity under the Federal Rules of Civil Procedure, both a "suit [at law]" and "a proceeding in equity" are subsumed under the phrase "civil proceeding." Rule 2 uses the phrase "civil action."

The Third Circuit was also of the opinion that a final decree enforcing an F.T.C. order was a final decree referred to in § 5. *N. J. Wood Finishing, supra*, at 358.

Because we find that these judgments fall squarely within the language of section 5, we need not review at length the legislative history of that section as the Supreme Court did in *Minnesota Mining & Mfg. Co.* v. *N.J. Wood Finishing Co.*, 1965, 381 U.S. 311, or as the First Circuit did in *Farmington, supra*. Suffice it to say that we can find nothing in that legislative history indicating that the Congress did not intend the words "judgment or decree" in section 5 to include a "decree" or "judgment" expressly authorized by section 11.

Procter argues that to allow an appellate court's enforcement to transform a Commission order into a "final judgment or decree" imposes an unconstitutional penalty upon the exercise of its right to judicial review. It says that an aggrieved respondent would seek review of a Commission order only at the risk of having the order used against it in a subsequent proceeding to impose treble damages. We find no merit in this argument. When the Clayton Act was adopted, the only enforcible order of the F.T.C. was one embodied in the decree of a Circuit Court of Appeals. Thus section 5 could only refer to such a decree. We have never heard it suggested that the somewhat similar dilemma in which a defendant or respondent in a court or F.T.C. proceeding to enforce the anti-trust laws finds itself by reason of the exclusion from the operation of section 5 of consent judgments or decrees renders the section unconstitutional.

All that section 5 does is that it "... establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. ... Such statutes have been generally sustained ... as have many other state and Federal enact-

ments establishing other rebuttable presumptions." *Meeker & Co. v. Lehigh Valley R.R.*, 1915, 236 U.S. 412, 430, dealing with a comparable provision of the Act to Regulate Commerce, § 16, 24 Stat. 379. We do not think that the risk of being subjected to such a "rebuttable presumption" is a sufficient burden on the right of review to render it unconstitutional. And if it be ultimately established that an unreviewed and unreversed, but final, F.T.C. order is also admissible under section 5, the argument now made would no longer have any possible validity.

We think it important to emphasize what we do *not* decide. The trial judge expressly reserved "for another day" "the matter of the extent to which evidentiary use may be made" of the judgment in question. So do we. The trial judge referred to the Commission's order. As we have pointed out, the order is merged in the decree of the Court of Appeals. It is the decree, therefore, that we hold admissible. We leave to the trial judge the question as to the extent to which the underlying record, made before the Commission, may be referred to to shed light on the evidentiary effect of the decree. We also leave to another day the question whether an F.T.C. order, final under the Finality Act, but not merged into a decree or judgment of a court of appeals, is admissible under § 5 of the Clayton Act.

Affirmed.

Civil No. 67-1546-WPG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PUREX CORPORATION, LTD., a corporation, *Plaintiff*,

vs.

THE PROCTER & GAMBLE COMPANY, a corporation, and THE CLOROX COMPANY, a corporation, *Defendants*.

Memorandum of Decision and Order

Filed January 22, 1970

The present action is for treble damages of more than five hundred million dollars, sought pursuant to section 4 of the Clayton Act (15 U.S.C. § 15) and arising out of the acquisition and retention by defendant Procter & Gamble (Procter) of the Clorox Chemical Company (Clorox) in 1957, the alleged effect of which has been "substantially to lessen competition . . . [and] to tend to create a monopoly," in violation of section 7 of the Clayton Act (15 U.S.C. § 18).[1] Prior to the filing of the complaint in this action, the Federal Trade Commission, after extensive hearings, ruled that such acquisition had been in violation of section 7, and ordered divestiture. (*In re The Procter & Gamble Co.*, 63 F.T.C. 1585 (1963)). The Court of Appeals reversed (358 F. 2d 74 (6th Cir. 1966)), and was in turn reversed by the Supreme Court, which directed that the order of the Commission be affirmed and enforced. (386 U.S. 568 (1967)).

The parties to this action have filed and argued motions which require a determination by this court of the extent to which, if at all, the hereinabove mentioned Commission order may be of support to Purex's damage claim. More

[1] The complaint also charges Procter and defendant Clorox Company (Procter's wholly owned subsidiary to whom the Clorox assets were transferred) with conspiracy to restrain trade and to obtain a monopoly in interstate commerce in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

particularly, the defendant Procter seeks a ruling that the divestment order by the Commission, as affirmed by the Supreme Court, was not a "final judgment or decree" within the meaning of section 5(a) of the Clayton Act (15 U.S.C. § 16(a)),[2] and that such section therefore does not require that the Commission order be received in this action as *prima facie* evidence that Procter's acquisition of Clorox violated the antitrust laws of the United States.

The plaintiff, on the other hand, not only urges that section 5(a) *does* apply to the Commission order, but goes farther and contends, as a preferred alternative, that such order conclusively settles the issue of Procter's violation of section 7, under the common law principle of collateral estoppel.

It is the conclusion of this court that the divestment order issued by the Commission is a "final judgment or decree" within the meaning of section 5(a) and therefore is admissible as *prima facie* evidence in this litigation to the extent provided by that section. It is also concluded that the common law principle of collateral estoppel does not serve here to increase the effect of the Commission order beyond that accorded by section 5(a).

The Admissibility Of A Final Commission Order.

The Supreme Court, in *Minnesota Mining and Mfg. Co. v. New Jersey Wood F. Co.*, 381 U.S. 311 (1965) (*3M*),

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[2] "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

construed section 5(b) of the Clayton Act (15 U.S.C. § 16(b)), and found that its provisions (which pertain to the tolling of the statute of limitations) apply to proceedings of the Federal Trade Commission. The opinion made several observations pertinent to an interpretation of the closely related section 5(a), but specifically refrained from asserting any conclusion as to the applicability of section 5(a) to Commission orders. After the *3M* decision, and until December 10, 1969, no reported decision gave direct consideration to the problem here concerned. Accordingly, the excellent briefs directed to the current issue were submitted on the then valid assumption that this court would be making the first post-*3M* attempt to reach a decision on this important issue, and the same thought influenced most of the preparatory work for this memorandum.

However, on December 10, 1969, there was published a decision in *Farmington Dowel Products Co.* v. *Forster Mfg. Co., Inc.*,— F. 2d — (1st Cir. 1969) (Antitrust and Trade Regulation Report, 12/16/69, page X-1). The opinion by Judge Coffin, speaking for a unanimous court, disclosed a careful study of the legislative history of section 5(a); discussed the few judicial decisions pertinent to that statute; traced the evolution of the Commission's responsibilities, powers, activities, and rules of practice; and concluded that section 5(a) is applicable to final orders of the Commission.

Inasmuch as I agree with the conclusion reached by Judge Coffin and, in most respects, with his reasons therefor, the length of this memorandum has been considerably reduced. Instead of attempting to set out in full the basis for each step in my own analysis, I shall, for the most part, simply state the general proposition and incorporate by reference Judge Coffin's explanations in justification thereof.

The Commission proceeding was a "civil or criminal proceeding brought by or on behalf of the United States." In

order for section 5(a) to be applicable, the Commission proceeding resulting in the order here concerned must have been a "civil or criminal proceeding brought by or on behalf of the United States . . ." Substantially the very same words are used in section 5(b) to describe the type of proceeding to which that statutory provision applies.[3] *3M* held that section 5(b) is applicable to Commission proceedings. In the absence of any apparent reason why the same words should be given different meanings in the two closely related sections, it is concluded that *3M* established that a Commission proceeding is a civil or criminal proceeding brought by the United States, within the meaning of section 5(a) as well as section 5(b). *Farmington Dowel Products Co.* v. *Forster Mfg. Co., Inc.*, — F. 2d — (1st Cir. 1969) (Antitrust and Trade Regulation Report, 12/16/69, page X-1):

The Commission order was a "judgment or decree," within the meaning of section 5(a). The opinion in *Farmington* acknowledged that from a semantic standpoint these words "referred only, or chiefly, to courts." Judge Coffin recognized also that those who participated in the congressional debates that preceded the enactment of section 5(a) were doubtless thinking of courts as being the sources of the judgments that would be used as evidence in subsequent

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[3] "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

litigation. However, from his review of those debates, he concluded that Congress had displayed no intention to preclude the possibility of a Commission order being given the effect that section 5(a) prescribed for a judgment or decree. He inferred, instead, that the principal concern of Congress in this respect was to make sure that section 5(a) effect be given only as a result of a proceeding that had been fairly conducted and in which there had been accorded a full opportunity to be heard.

The opinion in *Farmington* then proceeded to discuss the evolution of the responsibilities, powers, activities, and rules of practice of the Commission, and, in light thereof, expressed the belief that

> ". . . the legislative concern that the defendant get a 'day in court' before section 5(a) operates against him is fully satisfied by a Federal Trade Commission proceeding." — F. 2d —, —
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> (1st Cir. 1969) (A.T.R.R., 12/16/69, page X-6).

This court agrees, and accordingly holds that the Commission order here concerned is a "judgment or decree", as that term is used in section 5(a).

The Commission order is also "final". Section 5(a) accords evidentiary effect only to a *final* judgment or decree. In 1959, Congress amended section 11 of the Clayton Act, thereby enacting legislation commonly and appropriately referred to as the Finality Act, 15 U.S.C. § 21, 73 Stat. 243. This amendment provides automatic finality to orders of the Commission upon expiration of the time allowed for filing a petition for review in the court of appeals (15 U.S.C. § 21(g)(1)). It also provides that such orders shall become final upon affirmance by the court of appeals or by the Supreme Court (subsections (g)(3) and (4)). The Finality Act thus gives significant indication of the congressional conviction that Commission orders are worthy of being enforced, even in the absence of judicial review

thereof. That legislation also would settle the question of the finality of the order here concerned, if it is applicable.

The answer to this question involves a matter of chronology. Section 2 of the Finality Act provided that the changes made in the law by that Act ". . . shall have no application to any proceeding initiated before the date of enactment of this Act [July 23, 1959] . . . ." 73 Stat. 245. The Commission proceedings began with the filing of the complaint, in 1957, well before the adoption of the Finality Act; but the divestiture order came much later, on November 26, 1963. The same sequence of events was present in the *Farmington* case, and the court there held that the Finality Act applies to post-1959 *orders*, irrespective of the date the proceedings were instituted. However, I am unable to agree with Judge Coffin (see footnote 25 of his opinion in *Farmington*) that *F.T.C.* v. *Jantzen*, 386 U.S. 228 (1967) does not stand in the way of such a result. In *Jantzen*, it seems to me that Justice Clark, in speaking for the Court, construed the Finality Act to mean that no part thereof shall have any application to any proceeding initiated by the Commission before its enactment, on July 23, 1959. It is quite true that *Jantzen* was concerned with the enforcement of a Commission order that *predated* the Finality Act. However, the words of the statute, and the analysis made of them in the *Jantzen* opinion, indicate quite clearly to me that the Commission proceedings here concerned are not affected by the Finality Act.

Nonetheless, in the opinion of this court, the divestiture order with which we are concerned must be considered to have the finality required by Section 5(a). The purpose of such requirement is necessarily to make certain that a "judgment or decree" later used against a defendant in a private damage suit is not one that may be reversed on appeal; it should be an order that may be relied upon as constituting the "last word", as far as the issues in the litigation that gave rise to it are concerned. In this

case, as is indicated above, the order of the Commission was reviewed by the court of appeals and by the Supreme Court. The latter tribunal, in an opinion by Justice Douglas, ruled that ". . . the Commission's findings were amply supported by the evidence" (386 U.S. at 570), and the opinion concluded with an order that the matter be remanded to the court of appeals ". . . with instructions to affirm and enforce the Commission's order." (386 U.S. at 581) I do not see how any Commission order could have more finality, for purposes of section 5(a), or otherwise.

The court of appeals' opinion in the *3M* litigation contained the following observation:

> "While our 1914 legislators would not have accepted a bare FTC order of that period as admissible, the finality given such order through a decree emanating from the Court of Appeals would have resulted in its being considered a 'final judgment or decree', within Section 5(a)." *New Jersey Wood Finishing Co.* v. *Minnesota Mining & Manufacturing Co.*, 332 F.2d 346, 358 (3d Cir. 1964), aff'd on other grounds, 381 U.S. 311 (1965).

In this case the fact that affirmance was by the Supreme Court gives the quoted comment *a fortiori* application.

The defendants contend that to hold that affirmance by an appellate court may bestow upon a Commission order the section 5(a) finality that it would not otherwise merit, imposes an unconstitutional penalty upon the exercise of the right to judicial review. It is argued that such a holding would mean that an aggrieved defendant would appeal from an administrative order at the peril of having such order used later in imposing treble damages against him. In the context of the present situation, this court believes that the defendants' cries of pain are much louder than are warranted by the nature and extent of the wound.

It must be remembered that the issue of violation by the defendants of section 7 of the Clayton Act (15 U.S.C. § 18),

i.e., whether the effect of the acquisition complained of "*may be* substantially to lessen competition, or to tend to create a monopoly" (emphasis added), was thoroughly and vigorously litigated before the Commission and before the court of appeals and the Supreme Court. The question here is whether the order that was issued and upheld after such exhaustive litigation must be ignored altogether in the present proceedings or whether it may be used simply as a relevant starting point. If the parties here were the same as those in the Commission proceedings, the facts implicit in the resulting order would be conclusive against the defendants, under the principle of *res judicata*. Here, under section 5(a), a new plaintiff may make use of such order, but only on a *prima facie* basis.

A comment in the opinion of the Court in *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 430 (1915) with respect to a comparable statute,[1] which makes certain orders of the Interstate Commerce Commission *prima facie* evidence in later actions, is equally pertinent here:

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in anywise work a denial of due process of law. . . . Such statutes have been generally sustained[,] . . . as have many other state and Federal enactments establishing other rebuttable presumptions."

It is readily recognized, as the defendants contend, that the right to judicial review may not be curtailed or discouraged by the imposition of severe or unreasonable penalties upon the exercise of such right. However, in view of all of the foregoing, this court is unable to conclude that

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[1] 25 Stat. 859 (1889), as amended, 49 U.S.C. § 16(2) (1964).

the application of section 5(a) to the Commission order because it was affirmed by the Supreme Court, unreasonably penalizes the defendants.

Accordingly, it is adjudged that the Commission order of November 26, 1963, is a final judgment or decree within the meaning of section 5(a), and it will be given in these proceedings the evidentiary effect required by that statute.

The Principle of Collateral Estoppel Does Not Enlarge The Section 5(a) Significance Of The Commission Order.

According to section 5(a), the Commission order must be admitted in this case as *prima facie* evidence as to all matters respecting which the order would be an estoppel against Procter had this action been brought by the Government. In referring to section 5(a), Justice Clark said in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951):

> "We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit."

The reference to this benefit of estoppel as being conferred "subject only to a defendant's enjoyment of its day in court against a new party," clearly refers to the fact that the judgment or decree is admissible only as *prima facie* evidence, according to the explicit words of the statute.

But application here of the principle of collateral estoppel, as urged by the plaintiff, would mean that the Commission order would be *conclusive* as to all matters to which it applied. The Commission order cannot be both *prima facie* and conclusive; and, it having been determined that the statute applies, the statute must govern. Accordingly, the principle of collateral estoppel is adjudged not to be

applicable to this case, and the defendants are not estopped to deny anything expressed or implied in the Commission order.

The Evidentiary Significance Of The Commission Order.

Before concluding this memorandum, a word of caution is believed appropriate. Nothing in the foregoing is intended to contain any suggestion concerning this court's view as to how important the legal issue here decided is to the case at hand. The matter of the extent to which evidentiary use may be made of the Commission order is for another day. The plaintiff, at the appropriate time, will have the burden of showing wherein the Commission order and the factual findings upon which it was based are relevant, material and persuasive to the issues here to be tried. See *Gottesman v. General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969).

Order Disposing Of Pending Motions

For the reasons stated in this memorandum it is ordered as follows:

(a) The defendants' motion for a ruling that the Commission order, described in paragraph 24 of the complaint herein, was not a "final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States", within the meaning of Section 5(a) of the Clayton Act, 15 U.S.C. §-16(a), is denied.

(b) The plaintiff's motion for an order that the findings of the Commission shall be accorded collateral estoppel effect against the defendants, is denied.

Certification For Immediate Appeal

The issues here concerned raise important questions of law that have not been resolved by the Court of Appeals for this Circuit. A final determination of these matters

will clearly assist counsel in preparing for trial and may materially advance the ultimate termination of this litigation. This certification is made pursuant to 28 U.S.C. § 1292(b), in the event that counsel for either side desire to appeal from the interlocutory orders herein contained.

/s/ William P. Gray
United States District Judge